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Supreme Court, U.S.
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No. 01-611

IN THE

Supreme Court of the United States

RONALD L. BROWN,

Petitioner,

v.

WHEAT FIRST SECURITIES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

On October 9, 2001 Ronald L. Brown filed a petition for *certiorari* in the case of *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001). On November 13, 2001 Mr. Brown received a copy of respondent Wheat First's Brief in Opposition to this petition. In accordance with Supreme Court Rule 15(6), Mr. Brown hereby files his reply brief.

I. Wheat First Misstates the Controlling NASD Procedures.

It is undisputed that arbitrator Wendie Wachtel sat in judgment of the claims Mr. Brown filed before the National Association for Securities Dealers, Inc. ("NASD"), and that she failed to timely disclose "existing or past financial, business ...relationships or circumstances" she had with the Defendant in that arbitration proceeding. Brief in Opposition, pp. 3-4. It is also undisputed that Mr. Brown had only ten days from the date he received Ms. Wachtel's mandatory disclosure statement to exercise a peremptory challenge. *Id.* It is also undisputed that Ms. Wachtel waited until after the commencement of the first pre-hearing conference before disclosing her relationship with the Respondent. *Id.*, p. 4. The parties do not agree, however, whether there was a procedure available to Mr. Brown to correct Ms. Wachtel's failure to properly disclose her existing or past financial dealings with Wheat First.

Wheat First claims (as did the Court of Appeals) that Mr. Brown could have filed a motion with the NASD Director of Arbitration seeking additional time in which to raise a peremptory challenge. If true, Wheat First asserts, this case would not present a *Commonwealth Coatings* issue because the offending taint could have been corrected by Mr. Brown.

This procedural argument is without merit. Indeed, the NASD procedural rules applicable at the time of the Brown arbitration did not contemplate or permit extending the time period to file peremptory challenges. This fact is conceded by

NASD itself. NASD's interpretation of its arbitration rules demonstrates that this case presents an important issue of procedural fairness falling within the penumbra of *Commonwealth Coatings*, 393 U.S. 145 (1968).

On September 22, 2000, after the Brown arbitration panel had dismissed Mr. Brown's claims, the Securities and Exchange Commission published a NASD notice of proposed rule-making in the *Federal Register*. Securities and Exchange Commission, *Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealer, Inc. Relating to the Authority of the Director of Arbitration to Remove Arbitrators for Cause*, 65 *Federal Register* 57413 (September 22, 2000). The proposed rule change addressed the issue confronted by Mr. Brown in this proceeding, *i.e.*, what NASD was permitted to do under its own rules to correct problems arising from untimely disclosures of potential conflicts of interest.

In the rulemaking notice, NASD admitted that if a "disqualifying fact" came to light "before" the first "prehearing conference" the Director of Arbitration had the authority to remove a potentially tainted arbitrator. However, once a pre-hearing conference commenced the "Director's authority to remove an arbitrator ceases." 65 *Federal Register* at 57414.[1/]

This is precisely what occurred in the Brown proceeding. The disqualifying facts were disclosed during the first pre-hearing conference, after the authority of the Director to take any action to remove the tainted arbitrator had terminated. Thus, Mr. Brown was not able to petition to the

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[1/] The NASD rule in effect at the time of the Brown hearing states: "After the commencement of the . . . first pre-hearing conference . . . the Director's authority to remove an arbitrator from an arbitration panel ceases." NASD Rule 10312(f) (1998). This rule was subsequently changed in response to the NASD rulemaking. The change was effective on March 8, 2001, long after the Brown arbitration.

Director of Arbitration to increase the amount of time to file a peremptory challenge.

As NASD explained in their rulemaking:

> At this point [i.e. after the commencement of the first pre-hearing conference], however, a party can no longer use a challenge for cause to remove the arbitrator. Rather, the parties can only attempt to resolve the matter themselves, which can be difficult in the adversarial setting . . . if the parties do not agree, a party objecting to the continued service of the arbitrator may make a formal request for the arbitrator to recuse himself or herself; however, the arbitrator may decline the request.

65 *Federal Register* at 57414.

As NASD observed, a litigant's only recourse to challenge the continued participation of the arbitrator was through "judicial intervention." *Id.* NASD recognized that such judicial intervention would be predicated on *Commonwealth Coatings* related concerns, i.e., an issue regarding the "an arbitrator's failure to disclose a business relationship with one of the parties." *Id.*, n. 7.

Mr. Brown found himself in the precise predicament discussed in the NASD rulemaking. The arbitrator rejected a "for cause" issue raised by Mr. Brown and, when asked to leave the panel, refused to recuse herself. As recognized in the rulemaking, Mr. Brown was left with no option other then to seek judicial relief, which he did.

The Court of Appeals improperly rejected Mr. Brown's *Commonwealth Coatings* issues. The Court faulted Mr. Brown for not demonstrating that the arbitrator should have been rejected in accordance with the very high "for cause" standard. Mr. Brown correctly argued that under *Commonwealth Coatings*, the "for cause" standard is not the standard to be

applied where an arbitrator failed to make a mandatory disclosure of a potential conflict of interest.

Certiorari should be granted in this case, in order to clearly reject the "for cause" analysis presented by the lower court, and to resolve the split in the Circuit Courts as to whether the majority holding or the concurring opinion sets forth the proper standard for reviewing whether an arbitration award must be set aside when an arbitrator fails to make a timely disclosure of potential conflicts of interest.

II. The Bias of the Arbitrator Did Affect the Arbitration Award.

Wheat First seeks to downplay the prejudice caused by the tainted arbitrator's participation by asserting that Mr. Brown lost the arbitration proceeding by default. This argument is without merit because the tainted arbitrator participated in a number of pre-hearing decisions which led to Mr. Brown's decision to essentially boycott the proceeding. For example, the arbitrator participated in the panel which voted to charge Mr. Brown very high fees to continue with the proceeding, she voted on the panel which refused to stay the arbitration proceeding pending the district court proceedings, she voted on the panel which decided to reject Mr. Brown's motion for a dismissal without prejudice and she voted with the panel which decided to conduct the arbitration hearing after Mr. Brown objected to the proceeding going forward. In fact, instead of permitting Mr. Brown to withdraw his claim without prejudice, the tainted arbitrator voted with the panel and decided to issue a final ruling on the merits of Mr. Brown's complaint - a ruling with *res judicata* and *collateral estoppel* effect, and which subsequently resulted in the dismissal of a Civil Rights Act claim which was not even presented to the arbitrators. App. 10-11.

The procedures used by NASD in the Brown arbitration were flawed and in direct conflict with *Commonwealth Coatings*. The tainted arbitrator improperly failed to disclose potential conflicts of interest, as mandated by NASD rules. Mr.

Brown, unaware of any potential conflict, did not have the opportunity to meaningfully exercise his peremptory strikes. Thus, the tainted arbitrator was permitted to sit on the arbitration panel, and Mr. Brown had no procedural right to remove the tainted arbitration panel member.

Once Mr. Brown learned of the arbitrator's failure to make the mandatory disclosure, he promptly sought to have her removed from the panel. However, under the rules in place, Mr. Brown and NASD's Director of Arbitration were powerless to remove the arbitrator.

CONCLUSION

For the reasons set forth in Mr. Brown's Petition for Writ of Certiorari, and the forgoing reply brief, this Court should grant Mr. Ronald L. Brown's Petition. Wheat First could have avoided a *Commonwealth Coatings* problem by consenting to the withdrawal of the tainted arbitrator. Wheat First chose to ignore *Commonwealth Coatings*, and urged the lower courts to misconstrue that holding in a manner inconsistent with the prior holdings of this Court, other courts and the public interest.

Respectfully submitted,

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